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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,

vs.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION OF RESPONDENT THE ATTORNEY GENERAL OF MISSOURI

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The respondent John Ashcroft, Attorney General of Missouri, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of Missouri in this case.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 576 S.W.2d 310 (Mo.Banc 1978) and appears at A26-53 in the appendix to the petition. The opinion of the Missouri Court of Appeals, Kansas City District, did not become a final decision and was never officially reported. This opinion appears at A1-25 in the appendix to the petition. The Order of the trial court will not

be published and appears at A60 in the appendix to the petition.

On page 2 of the petition the petitioner in reviewing the opinions below indicates that the Supreme Court of Missouri reinstated the judgment of the trial court holding that petitioner had not been subjected to unlawful discrimination. The respondent Attorney General respectfully disagrees with this contention. Instead, it is the view of this respondent that the trial court and the Supreme Court of Missouri properly found that there was not sufficient state action in this case. As a result, any issue as to discrimination was not passed upon by the Missouri courts and the resolution of this issue was not necessary to the decision.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether there is significant state action involved so as to be violative of the Equal Protection Clause of the Fourteenth Amendment or of the Civil Rights Act, 42 U.S.C., §1983, when a private individual establishes a charitable trust for scholarships for the benefit of "deserving boys" to attend a private university which later becomes public and the funds are disbursed under the will by a private trustee but the state university processes, and from a particular class of boys makes a "tentative award" to members of that class and forwards the names to the private trustee which are then "approved" by the trustee.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. There Is No Special or Important Reason for Granting This Writ.

The dispute in this case is primarily a factual one, i.e., do the facts in this particular case involve significant state action so as to be violative of the Equal Protection Clause of the Fourteenth Amendment or of the Civil Rights Act, 42 U.S.C.A., §1983, in the administration of the Victor Wilson Charitable Trust.

The contention of the petitioner on page 9 of her petition that this case affects every public college and university in the country that is involved to any degree in the administration of scholarships or trusts created or operated for the benefit of a limited group is overly broad. As was pointed out by the Supreme Court of Missouri, each case must hinge on its own facts in this area of the law and the involvement of the state may take many forms. Cf. *First National Bank of Kansas City* v. *Danforth*, 523 S.W.2d 808, 819 (Mo. 1975), *cert. den. sub nom., Sutt* v. *First National Bank of Kansas City*, 421 U.S. 992, 95 S.Ct. 1994, 44 L.Ed.2d 483 (1975); and *Lakeside Hospital Association* v. *First National Bank of Kansas City*, 421 U.S. 1016, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975). As a result, a determination of the issue presented by this case will not serve as any guidelines for other cases in which the facts may be different. In this regard, a factual situation such as that presented here is unlikely to occur frequently and the outcome of this case has no wide public important.

In summary, the issue in the present case is narrow and unique to its facts and it is submitted that no amount

of rhetoric should convert it into one warranting review on certiorari.

II. The Decision of the Supreme Court of Missouri Is Correct and Is Not in Conflict With Any Decision of This Court.

It has been indicated by this Court in various opinions that not every activity of the state constitutes state action in violation of the First and Fourteenth Amendments. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Evans* v. *Newton,* 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); *Moose Lodge No. 107* v. *Irvis, et al.,* 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); and *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 47 (1974). It is only by sifting facts and weighing circumstances can a determination be made whether the reach of the Fourteenth Amendment extends to a particular case. *Burton* v. *Wilmington Parking Authority, supra.* In this regard, this Court has pointed out that private conduct abridging individual rights does no violence to the Equal Protection Clause "unless to some significant extent the state in any of its manifestations has been found to have become involved in it." *Burton,* 81 S.Ct. at 860. It is only when the state so far insinuates itself into a "position of interdependence that it becomes a joint participant in the challenged activity or where private conduct becomes so entwined with governmental policies that there is a violation." *Evans,* 86 S.Ct. at 488, and *Burton,* 81 S.Ct. at 862. The holdings of this Court further indicate that where "the impetus for the discrimination is private, the state must have significantly involved itself with invidious discriminations." *Moose Lodge,* 92 S.Ct. at 1971. Lastly, "the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action

. . . so that the action . . . may be fairly treated as that of the state itself." *Jackson,* 95 S.Ct. at 453.

After discussing the foregoing principles, the Supreme Court of Missouri concluded in a majority opinion that by sifting all the facts and circumstances there was not significant state action involved in this case so as to be violative of the Equal Protection Clause of the Fourteenth Amendment or of the Civil Rights Act, 42 U.S.C.A., §1983 (A.45). It was pointed out that the testator was a private individual who established a private trust with his private funds for the benefit of deserving Kansas City "boys". In his will, he appointed a bank as private trustee and established a procedure by which the recipients of the trust would be selected. Therefore, under the terms of the will no public agency or state action was involved (A.45). In addition, the majority opinion reviewed the process and procedure for disbursing scholarship funds under the Victor Wilson Trust and concluded that the involvement of the University was not such which called into play the Fourteenth Amendment (A.46). It was emphasized that the agents of the University, under the will, do not have the power to reelect, or determine, or ultimately and finally determine those qualified boys who are awarded scholarship funds (A.46). Instead, this power resides in the private trustee. The private trustee has the power to approve as well as disapprove male applicants. The final and last act of selection is left to and is that of the private trustee (A.46). Further, the University has no discretion under the terms of the trust to forward the names of women to the private trustee and cannot request the trustee to violate the terms of the trust thus subjecting it to possible sanctions (A.47). As a result, in considering the allegations raised in the petition and on the motions to dismiss and the record

of this proceeding, the Supreme Court of Missouri by its majority opinion concluded that it did not believe that the participation by the agents of the University of Missouri was of such a significant extent in any of its manifestations or was so entwined with private conduct that state action resulted and the petition failed to state a claim (A.45-47). It is submitted that the majority opinion of the Supreme Court of Missouri is correct and in accordance with the teachings of this Court.

In connection with the above, the basic argument made by the petitioner in her petition is that the Supreme Court of Missouri should not have decided this case on a motion to dismiss, but that the case should have been remanded to the circuit court for trial. It is submitted that the petitioner's argument on this issue is not persuasive. In its decision, the majority opinion of the Supreme Court of Missouri properly states that its review of the dismissal of the petition allows the pleading its broadest intendment, treats all facts alleged as true, construes the allegations favorably to the plaintiff and determines whether the averments involve principles of substantive law (A.28). Subsequently, the majority opinion in its decision, sets forth the "process and procedure" for disbursing scholarship funds under the Victor Wilson Trust as garnered from the petition, answers to interrogatories and motions (A.37-38). This "process and procedure" as stated by the Court is certainly fair, accurate, favorable to the contentions of the petitioner and in accordance with the foregoing principles in reviewing the dismissal of a petition. In addition, there is authority for the proposition that a wide range of material may be considered in connection with a motion to dismiss for failure to state a claim upon which relief can be granted. Thus, illustrative of the type of evidence that has been used in a Rule 12(b)(6) motion

in federal courts are the following: admissions of counsel, affidavits, answers to interrogatories, collective bargaining agreements, contracts, copyrighted material, depositions, exhibits, hearsay, issues of a magazine, court judgments and orders, judicial notice of prior pleadings, leases, letters, oral argument, prior pleadings, and transcripts of prior court proceedings. See, Wright and Miller, *Federal Practice and Procedure*, §1364, p. 669. Also, as is suggested by the majority opinion in a footnote in its decision, it is conceivable that the trial court may have treated the motion to dismiss as one for summary judgment (A.33).

In any event, the petitioner's reliance on the decision of *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), in support of her argument is misplaced. It is important to note that in *Rhodes* the district court acted before answers were filed and without any evidence other than the copies of the proclamations issued by the respondent Rhodes and brief affidavits of the adjutant general and his assistant. In addition, the issue in *Rhodes* was *not* whether or not "state action" was involved, and whether or not a claim had been stated, but instead whether or not relief could be granted in that the complaints placed directly in issue whether or not the respondent Rhodes and his subordinates had acted in good faith both in proclaiming an emergency and as to the action taken to cope with the emergency so declared. Such is not the case at bar! On the other hand, in the case of *Jackson* v. *Metropolitan Edison Co.*, *supra*, as discussed in the majority opinion, the issue directly for consideration was whether or not a Pennsylvania utility company's termination of electric service to the plaintiff's home for the non-payment of bills constituted "state action". After granting certiorari, this court affirmed the decision of the district court in dismissing the plaintiff's complaint in a

motion to dismiss on the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action on which relief could be granted. *Jackson* v. *Metropolitan Edison Co.*, 348 F.Supp. 954 (M.D. Penn. 1972). As a result, it is submitted that the petitioner's argument on this issue should not prevail.

Having concluded that the Supreme Court of Missouri by its majority opinion properly sustained the decision of the trial court in dismissing the complaint of the petitioner on a motion to dismiss, we will not discuss in detail her contention that this case should have been remanded to the circuit court for trial. However, in view of the majority opinion's careful and favorable consideration of the petitioner's complaint, we frankly do not believe that she could have achieved any better result in a full blown evidentiary hearing. It should also be noted that the petitioner has filed her complaint on three different occasions. Under such circumstances, it would seem reasonable that the respondents in this action should as a matter of law be able to raise a defense to her complaint to prevent the injustice of being held in court (with incidental subjection to discovery and other procedural vexations) when her complaint in law is a plain nullity and to finally end this litigation once and for all.

Lastly, having properly found that there was not sufficient "state action" in this case, any issue as to discrimination was not passed upon by the Supreme Court of Missouri as the resolution of this decision was not necessary to its decision. Also, in a footnote to the majority opinion, the Court indicated that the parties did not raise and no consideration was given to what effect, if any, the 1972 Amendments to Title IX of the Higher Education Act would have on this cause (A.48). Therefore, this Court's recent decision in *Cannon* v. *University of Chicago*,

47 U.S.L.W. 4549 (U.S. May 14, 1979), does not require any reviewability of this case.

In summary, it is respectfully submitted that the decision of the Supreme Court of Missouri is correct and is not in conflict with any decision of this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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